

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 42M 30151756 BY STEPHEN & MARILYN R PUST) PRELIMINARY DETERMINATION TO) GRANT PERMIT
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On December 9, 2020, Stephen & Marilyn R Pust (Applicant) submitted Application for Beneficial Water Use Permit No. 42M 30151756 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 1,300 gallons per minute (GPM) and 630 acre-feet (AF) of groundwater per annum for the purpose of irrigation. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of August 12, 2021. An Environmental Assessment for this Application was completed on August 12, 2021.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600-GW
- Attachments
 - System Design or Check, Pivot Sprinkler
 - Pivot Specifications
 - Pump Information
 - Maps: USDA aerial photo depicting well location, place of use and conveyance facilities and routes.
- Aquifer Testing Addendum
 - Form 633, Aquifer Test Data (electronic)

- Well logs for production and monitoring wells
- Variance request

Information within the Department's Possession/Knowledge

- Aquifer Test Report, dated July 22nd, 2021 by Attila Felnagy, Groundwater Hydrologist with the MT DNRC
- Depletion Report, dated July 22nd, 2021 by Attila Felnagy, Groundwater Hydrologist with the MT DNRC
- Department water rights records of existing rights.
- USGS Gaging stations:
 - USGS Station #06329200, Burns Creek near Savage, MT (October 1957 to December 1987).
 - USGS Station #06329500, Yellowstone River near Sidney, MT(October 1910 to March 2021).
- Granted variance request, dated July 22nd, 2021 by Steven B Hamilton, Deputy Regional Manager
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application, but is available upon request. Please contact the Glasgow Regional Office at 406-228-2561 to request copies of the following document.
 - DNRC: Technical Memorandum: Physical and Legal Availability of Ground Water, dated April 22, 2019.

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED APPROPRIATION



Preliminary Determination to Grant
Application for Beneficial Water Use Permit No. 42M 30151756.

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater, by means of a well (260 feet deep) completed in the Lower Yellowstone Buried Channel aquifer (LYBCA). The well is located in the SESESE of Section 6, T20N, R58E, Richland County. The Applicant plans to appropriate water from April 1st to October 31st at 1,300 GPM up to 630 AF per annum. The Applicant proposes to irrigate crops on 252 acres per annum. The place of use is divided into two 126-acre pivots with no overlap. The place of use is generally located in the S2 of Section 6, T20N, R58E, Richland County.
2. The point of diversion and place of use are located in the Lower Yellowstone River basin (42M), which is an area that is not subject to any water right basin closures or controlled ground water area restrictions.

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

3. The Montana Constitution expressly recognizes in relevant part that:
 - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
- Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:
- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for

the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

4. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

5. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

6. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnes (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

Memorandum and Order (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

7. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

8. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

9. The Applicant provided an Aquifer Testing Addendum and Aquifer Test Data Form (Form 633). Form 633 was submitted in electronic format. Department Hydrologist, Attila Felnagy, completed a Depletion Report on July 22, 2021 and completed an Aquifer Test Report, on July 22, 2021.

10. The proposed diversion consists of a 16-inch production well. The well was completed to a depth of 260 feet and has a static water level of 148 feet. To address the aquifer testing

requirements of ARM 36.12.121, the Applicant conducted a 72-hour constant rate test at the proposed pumping rate of 1,300 GPM. A variance of aquifer testing requirements in ARM 36.12.121 for 3c, 3g, 3i and 3j. The observation well (GWIC # 273796) is located 150 feet from the Pust pumping well. The observation well is 260 feet deep. The groundwater level data for the pumping and observation wells was collected with a Level TROLL automatic data logger from In-Situ[®]. The discharge was measured using a Seametrics electromagnetism inline magnetic probe-type flow meter and conveyed 240 feet away downgradient from the aquifer test location.

11. An evaluation of physical groundwater availability was done by following procedures described in DNRC (2019). Physical groundwater availability for comparison with legal demands is evaluated based on inflow to the LYBCA of 9,153 AF from Chandler and Reiten (2021, in preparation).

12. Based on this information, the Department finds that the amount of groundwater the Applicant seeks to appropriate, 1,300 GPM (2.1 CFS) up to 630 AF, is physically available in the source aquifer.

13. The proposed well is located 1.7 miles, 2.3 miles, 4.2 miles, and 11.2 miles from Dunlap Creek, Sears Creek, Yellowstone River, and Burns Creek respectively. The source aquifer consists of unconfined sand and gravel water producing zones in a buried ancestral channel of the Yellowstone River bounded by the Tongue River Member of the Tertiary Fort Union Formation to the west and east. Multiple intermittent stream channels including Dunlap Creek, Sears Creek, and Crane Creek that are mapped within the LYBCA boundaries flow primarily during precipitation events and, therefore, are not considered potentially affected sources. The Tongue River Member likely limits the propagation of drawdown to the LYBCA and alluvium of the Yellowstone River. Depletion to surface water for the subject Application was evaluated for the Yellowstone River below the confluence of Burns Creek.

14. The Applicant is requesting an appropriation which would result in varied depletion rates. The Depletion Report identified a potential maximum depletion of 0.03 CFS to Burns Creek and

0.96 CFS in the Yellowstone River as determined in by DNRC Groundwater Hydrologists Attila Folsnag. The Depletion Report identifies 558.6 AF volume consumed on an annual basis, 17.7 AF will be depleted from Burns Creek and 540.9 AF will be depleted from the Yellowstone River.

Source: Burns Creek

15. The following USGS gage was utilized to quantify median of mean monthly flows and volumes on the Burns Creek: USGS Station #06329200, Burns Creek near Savage, MT. This gaging station is located approximately 1 mile upstream of the confluence with the Yellowstone River. The period of record is near continuous from October 1957 to December 1987. Table 1 shows the median of mean monthly flows (CFS) at the gaging station during the year. Median of the mean monthly volumes were calculated by multiplying the median of the mean monthly flow rates in CFS by the number of days in the month by 1.98 AF/CFS/day.

Table 1: USGS Station #06329200, Burns Creek near Savage, MT						
	Jan	Feb	Mar	Apr	May	Jun
Flow (CFS)	0.40	0.79	14.80	4.82	3.06	4.39
Volume (AF)	24.3	43.6	908.4	286.0	187.5	260.8

	Jul	Aug	Sep	Oct	Nov	Dec
Flow (CFS)	1.83	0.25	0.22	1.02	0.91	0.66
Volume (AF)	112.3	15.3	13.0	62.6	54.2	40.6

16. The depletions will manifest in Burns Creek downstream of the northeast quarter of Section 33 in Township 19 North, Range 57 East. There are three intervening rights between the gage and upstream extent of where the depletions will manifest in Burns Creek. All three rights are Statements of Claims with priority dates that both predate and overlap the period of record for the gage (42M 101398-00, 42M 163154-00, & 42M 30133558). Their use is assumed to have occurred during the period of record and reflected in the gage record. These water rights were

added the gage data to determine the physical amount of water in the reach where depletions will manifest, because the gaging station is downstream of the depleted reach.

Table 2: Burns Creek Physical Availability - Flow Rate (CFS)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median of the Mean Monthly Flows (USGS 06329200)	0.40	0.79	14.80	4.82	3.06	4.39	1.83	0.25	0.22	1.02	0.91	0.66
Water Rights between POD and Gage	0.08	0.08	0.08	0.14	1.88	1.88	1.88	1.88	1.88	1.88	0.08	0.08
Flow Rate Physically Available	0.47	0.86	14.88	4.96	4.94	6.27	3.71	2.13	2.10	2.90	0.99	0.74

Table 3: Burns Creek Physical Availability - Volume (AF)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median of the Mean Monthly Volume (USGS 06329200)	24.3	43.6	908.4	286.0	187.5	260.8	112.3	15.3	13.0	62.6	54.2	40.6
Water Rights between POD and Gage	0.1	0.1	0.1	0.2	6.0	6.0	6.0	6.0	6.0	6.0	0.1	0.1
Volume Physically Available at the POD	24.5	43.7	908.6	286.3	193.5	266.8	118.3	21.3	19.0	68.6	54.4	40.7

17. The Department finds that water is physical available in the affected reach of the Burns Creek.

Source: Yellowstone River

18. The following USGS gage was utilized to quantify median of mean monthly flows and volumes on the Yellowstone River: USGS Station #06329500, Yellowstone River near Sidney, MT. This gaging station is located approximately 25 miles downstream of the point where depletions will manifest on the Yellowstone River (below the confluence of Burns Creek and the Yellowstone River). The period of record is near continuous from October 1910 to September 2018. Table 2 shows the median of mean monthly flows (CFS) and volumes (AF) at the gaging station during the year.

Table 4: USGS Station 06329500 Yellowstone River near Sidney MT						
	Jan	Feb	Mar	Apr	May	Jun
Flow (CFS)	5325	5996	9832	9205	17420	40480
Volume (AF)	326849	332418	603488	546777	1069240	2404512

	Jul	Aug	Sep	Oct	Nov	Dec
Flow (CFS)	21400	7516	6801	7698	7297	5842
Volume (AF)	1313532	461332	403979	472503	433442	358582

19. The following (List 1) is a list of all intervening water rights between the USGS gage and the location where depletions were identified to manifest (below the confluence of Burns Creek and the Yellowstone River). This list was generated in order to calculate flow rate and volume physically available in the depleted reach of the Yellowstone River. These water rights were added the gage data to determine the physical amount of water in the reach where depletions will manifest, because the gaging station is downstream of the depleted reach. Tables 5 and 6 show the physical availability of the affected portion of the Yellowstone River.

**List 1: Physical Demands on the Yellowstone River Below the confluence
of Burns Creek and the USGS Station 06329500 Yellowstone River near
Sidney MT**

Water Right #	Flow (CFS)	Volume (AF)	Township/Range	Period of Diversion
42M 119268 00	133	37845	22N59E	04/01 to 10/31
42M 30048245	13	947	21N59E	04/01 to 10/31
42M 119271 00	43	33	21N59E	04/01 to 10/31
42M 119272 00	43	33	21N59E	04/01 to 10/31
42M 89849 00	11	1540	21N59E	04/01 to 10/01
42M 119269 00	133	870	21N59E	04/01 to 10/31
42M 122088 00	6	3225	21N59E	04/01 to 10/31
42M 137599 00	0.1	1.4	21N59E	01/01 to 12/31
42M 5610 00	5	300	21N59E	05/01 to 09/15
42M 16408 00	3	2500	21N58E	04/15 to 10/29
42M 28971 00	2	114	21N58E	04/01 to 11/01
42M 215790 00	22	2184	20N59E	04/01 to 10/31
42M 18838 00	4	500	20N59E	04/01 to 10/31
42M 2137 00	13	1410	20N58E	03/01 to 12/04
42M 122059 00	4	304	20N58E	04/01 to 10/31
42M 11398 00	5	275	20N58E	04/01 to 10/15
42M 18839 00	10	762	20N58E	04/01 to 10/31
42M 22002 00	14	529	20N58E	04/15 to 10/15
42M 122061 00	4	90	20N58E	04/01 to 10/31
42M 115112 00	8	900	19N58E	04/01 to 10/31
42M 10780 00	0	3	19N58E	01/01 to 12/31
42M 101415 00	11	3597	19N58E	04/15 to 10/01
42M 114746 00	4	512	19N58E	04/01 to 11/01
42M 101416 00	1	2833	19N58E	04/15 to 10/01
42M 137602 00	0.1	6	19N58E	01/01 to 12/31
42M 30142659	0.1	2.0	20N59E	01/01 to 12/31
42M 30142660	0.1	1.4	21N58E	01/01 to 12/31
42M 30142661	0.1	1.3	20N58E	01/01 to 12/31
42M 30142662	0.1	2.5	19N58E	01/01 to 12/31
42M 30142663	0.1	0.3	19N58E	01/01 to 12/31
42M 30144363	0.1	2.9	21N58E	01/01 to 12/31

Table 5: Yellowstone River Physical Availability - Flow Rate (CFS)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median of the Mean Monthly Flow rates (USGS 06329500)	5325	5996	9832	9205	17420	40480	21400	7516	6801	7698	7297	5842
Water Rights between Depletion and Gage	1	1	14	489	494	494	494	494	494	477	14	1
Flow Rate Physically Available	5326	5997	9846	9694	17914	40974	21894	8010	7295	8175	7311	5843

Table 6: Yellowstone River Physical Availability - Volume (AF)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median of the Mean Monthly Volume (USGS 06329500)	326849	332418	603488	546777	1069240	2404512	1313532	461332	403979	472503	433442	358582
Water Rights between Depletion and Gage	2	2	158	8144	9032	9032	9032	9032	8998	7731	158	2
Volume Physically Available at the Depletion	326850	332420	603647	554921	1078271	2413544	1322564	470364	412978	480234	433600	358584

20. The Department finds that water is physical availably in the affected reach of the Yellowstone River.

CONCLUSIONS OF LAW

21. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

22. It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

23. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

24. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 9-20)

Legal Availability:

FINDINGS OF FACT

25. The Aquifer Test report identified the zone of influence as the entire LYBCA aquifer. The following is a list of existing legal demands for groundwater within the Department's identified zone of influence.

List 2: Existing Legal Demands for Groundwater			
Water Right #	Water Right Type	Priority Date	Volume Diverted (AF)
42M 16331 00	STATEMENT OF CLAIM	12/31/1949	2
42M 163548 00	STATEMENT OF CLAIM	12/10/1981	2.52
42M 164403 00	STATEMENT OF CLAIM	12/31/1930	2.57
42M 164473 00	STATEMENT OF CLAIM	12/31/1959	0.42
42M 165285 00	STATEMENT OF CLAIM	6/3/1970	0.63
42M 165288 00	STATEMENT OF CLAIM	12/31/1958	0.63
42M 2144 00	STATEMENT OF CLAIM	7/31/1961	1.4
42M 30021915	GROUND WATER CERTIFICATE	3/7/2006	10*
42M 30030976	GROUND WATER CERTIFICATE	1/24/2008	10*

42M 30042083	GROUND WATER CERTIFICATE	5/12/2008	10*
42M 3263 00	GROUND WATER CERTIFICATE	8/8/1974	10*
42M 164405 00	STATEMENT OF CLAIM	12/31/1919	0.4
42M 39626 00	GROUND WATER CERTIFICATE	1/13/1982	0.42
42M 163549 00	STATEMENT OF CLAIM	12/31/1950	1
42M 23822 00	GROUND WATER CERTIFICATE	7/30/1979	1
42M 37487 00	GROUND WATER CERTIFICATE	11/9/1981	1
42M 163536 00	STATEMENT OF CLAIM	12/31/1946	1.5
42M 163547 00	STATEMENT OF CLAIM	12/31/1950	1.5
42M 164404 00	STATEMENT OF CLAIM	12/31/1930	1.5
42M 46971 00	GROUND WATER CERTIFICATE	6/8/1982	1.5
42M 71251 00	GROUND WATER CERTIFICATE	4/6/1989	1.5
42M 30124874	GROUND WATER CERTIFICATE	5/24/2019	1.63
42M 45175 00	GROUND WATER CERTIFICATE	5/17/1982	2
42M 163550 00	STATEMENT OF CLAIM	12/31/1950	2.5
42M 30063790	GROUND WATER CERTIFICATE	8/8/2012	2.51
42M 57290 00	GROUND WATER CERTIFICATE	9/27/1984	2.72
42M 36671 00	GROUND WATER CERTIFICATE	10/15/1981	3
42M 41550 00	GROUND WATER CERTIFICATE	12/10/1981	3.35
42M 41552 00	GROUND WATER CERTIFICATE	12/10/1981	3.35
42M 43670 00	GROUND WATER CERTIFICATE	4/14/1982	3.4
42M 30127160	GROUND WATER CERTIFICATE	6/18/2019	3.5
42M 59496 00	GROUND WATER CERTIFICATE	5/1/1985	4
42M 30118249	PROVISIONAL PERMIT	1/18/2019	200
42M 30047258	PROVISIONAL PERMIT	3/29/2010	272
42M 30066962	PROVISIONAL PERMIT	8/5/2013	272
42M 30150753	PROVISIONAL PERMIT	12/21/2020	285
42M 30111116	PROVISIONAL PERMIT	10/5/2017	300.2
42M 30106840	PROVISIONAL PERMIT	5/12/2016	310
42M 30148789	PROVISIONAL PERMIT	5/4/2020	315
42M 30123375	PROVISIONAL PERMIT	4/4/2019	325
42M 30072719	PROVISIONAL PERMIT	3/25/2015	342
42M 30114906	PROVISIONAL PERMIT	12/21/2017	362
42M 30110211	PROVISIONAL PERMIT	2/9/2017	375
42M 30116709	PROVISIONAL PERMIT	4/12/2018	400
42M 106945 00	PROVISIONAL PERMIT	2/10/1999	409

42M 30147170	PROVISIONAL PERMIT	12/13/2019	710
42M 30106841	PROVISIONAL PERMIT	6/17/2016	858
			5,788.65

**This right is limited to the actual amount used up to 10 acre-feet.*

26. The legal demands within the zone of influence total 5,788.65 AF per annum. Compared to annual inflow to the LYBCA of 9,153 AF, there is 3,364 AF per annum legally available to appropriate after all existing water rights have been accounted for. The Applicant is proposing an appropriation of 630 AF leaving 2,734 AF remaining in the zone of influence. Therefore, there is sufficient groundwater supply for the proposed well. The annual volume the applicant plans to appropriate is legally available in the source aquifer.

Burns Creek

27. The Department defined the area of potential surface water impact on Burns Creek as the area between western edge of the northeast quarter of Section 33, T19N, R57E, and the downstream confluence with the Yellowstone River. List 3 is the existing surface water rights within the area of potential impact on Burns Creek.

28. There is only five legal demand in Burns Creek between where the depletion of the proposed appropriation will manifest and the Yellowstone Confluence. When evaluating criteria for legal availability (ARM 36.12.1704 & 36.12.1705) existing legal demands will be subtracted from physically available water. Tables 7 and 8 show the legal availability on the affected portion of Burns Creek.

List 3: Existing Legal Demands on Burns Creek					
Water Right #	Flow (CFS)	Volume (AF)	Section	Township/Range	Period of Diversion
42M 101397-00	0.008	2.25	27	19N57E	01/01 to 12/31
42M 30142644	0.08	Unclaimed	27	19N57E	01/01 to 12/31

**Table 7: Burns Creek Legal Availability -
Flow Rate (CFS)**

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Flow Rate Physically Available	0.47	0.86	14.88	4.96	4.94	6.27	3.71	2.13	2.10	2.90	0.99	0.74
Legal Demands	0.09	0.09	0.09	0.09	0.09	0.09	0.09	0.09	0.09	0.09	0.09	0.09
Flow Rate Legally Available	0.39	0.78	14.79	4.87	4.85	6.19	3.63	2.05	2.02	2.82	0.91	0.65

**Table 8: Burns Creek Legal Availability -
Volume (AF)**

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Volume Physically Available	24.5	43.7	908.6	286.3	193.5	266.8	118.3	21.3	19.0	68.6	54.4	40.7
Downstream Water Rights	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Volume Legally Available	24.3	43.6	908.4	286.1	193.3	266.6	118.1	21.1	18.8	68.4	54.2	40.5

29. The comparisons in Tables 9 and 10 show water is legally available in Burns Creek throughout the year, after accounting for net depletion.

**Table 9: Burns Creek Comparison - Flow
Rate (CFS)**

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Flow Rate Legally Available	0.39	0.78	14.79	4.87	4.85	6.19	3.63	2.05	2.02	2.82	0.91	0.65
Depletion (CFS)	0.02	0.03	0.02	0.03	0.02	0.03	0.02	0.02	0.03	0.02	0.03	0.02
After Depletion	0.36	0.75	14.77	4.85	4.83	6.16	3.60	2.02	1.99	2.79	0.88	0.63

**Table 10: Burns Creek Comparison - Volume
(AF)**

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Volume Legally Available	24.3	43.6	908.4	286.1	193.3	266.6	118.1	21.1	18.8	68.4	54.2	40.5
Depletion	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5
Volume Remaining	22.8	42.1	906.9	284.6	191.8	265.1	116.6	19.6	17.3	66.9	52.7	39.0

Yellowstone River

30. The Department created a listing of the existing water rights between the upstream extent of the depletion at the confluence with Burns Creek to the North Dakota border including the Montana Department of Fish, Wildlife & Parks (FWP) instream flow reservation, as well as private individual rights. The list of legal demands is in the file. The Department then compared the physical water availability (median of mean monthly flow rates and volumes) to the legal demands appropriated under the existing water rights and reservations identified. The Department calculated the median of the mean monthly flow rates and volumes represented in Tables 11 and 12 that are legally available for appropriation. The appropriated volumes were calculated by dividing the claimed volumes of the downstream rights by the number of months of the claimed period of use and the FWP instream right volumes are based on the Yellowstone Water Reservations Final Order.

Table 11: Legal Availability - Flow Rate (CFS)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Flow Rate Physically Available	5326	5997	9846	9694	17914	40974	21894	8010	7295	8175	7311	5843
FWP Instream Reservation	3738	4327	6778	6808	11964	25140	10526	2676	3276	6008	5848	3998

Legal Demands	1	1	14	489	494	494	494	494	494	477	14	1
Flow Rate Legally Available	1587	1669	3054	2397	5456	15340	10874	4840	3525	1690	1449	1783

Table 12: Legal Availability - Volume (AF)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Volume Physically Available	326850	332420	603647	554921	1078271	2413544	1322564	470364	412978	480234	433600	358584
FWP Instream Reservation	229438	248456	416034	404395	734350	1493316	646086	164253	194594	368771	347371	245397
Downstream Water Rights	2	2	158	8144	9032	9032	9032	9032	8998	7731	158	2
Volume Legally Available	97411	83962	187454	142382	334890	911196	667446	297079	209385	103732	86071	113185

31. Tables 13 and 14 show water is legally available in the Yellowstone River after accounting for depletion that occurs year-round. For ease of calculation the flow rates were rounded to the nearest tenth and volumes were rounded to the nearest whole number. The legal availability after deletions is summarized in the tables below. These depletions will manifest in the Yellowstone River.

Table 13: Yellowstone River Comparison - Flow Rate (CFS)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Flow Rate Legally Available	1577	1664	3021	2397	5456	15340	10874	4840	3525	1690	1449	1783
Depletion	1	1	1	1	1	1	1	1	1	1	1	1
Flow Rate Remaining	1576	1663	3020	2396	5455	15339	10873	4839	3524	1689	1448	1782

Table 14: Yellowstone River Comparison - Volume (AF)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Volume Legally Available	96797	83685	185398	142382	334890	911196	667446	297079	209385	103732	86071	113185
Depletion	45	41	37	35	33	37	44	52	57	58	54	49
Volume Remaining	96752	83644	185361	142348	334856	911159	667403	297027	209328	103674	86017	113136

CONCLUSIONS OF LAW

32. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

33. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that

those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005))(it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

34. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No.*

63997-42M by *Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 ; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

35. Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by*

Utility Solutions LLC (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, *supra*.

36. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 25-31)

Adverse Effect

FINDINGS OF FACT

37. Water is physically and legally available for both groundwater and hydraulically connected surface water in all months of the proposed period of diversion. As proposed in the submitted application, the proposed well will be equipped with a Micrometer in-line flow meter that will measure the flow rate in GPM and totalize the volume in AF.

38. The evaluation of drawdown in other wells was done using the Theis (1935) solution with the following parameters: $T = 28,100 \text{ ft}^2/\text{day}$, and $S = 0.1$. After the fifth July of a monthly pumping schedule, drawdown in excess of 1 foot is anticipated to extend 5,050 feet from the Applicant's well. There is one water right for a well completed in the LYBCA that may experience drawdown greater than 1 foot.

Table 15: Well(s) Anticipated to Have Excess of 1 Foot of Drawdown After 5 Years

Water Right No.	Owner Name	Distance (ft)	Well Depth (ft)	Static Water Level (ft) bgs	Additional Drawdown (ft)	Available Water Column (ft)
42M 30147170	D. L. & J.A. JORGENSEN	2,200	260	156	2	102

39. If a valid call is made on the water the Applicant will make the necessary adjustments to the amount being pumped to alleviate adverse impacts.

40. The Department finds there will be no adverse effect because the amount of water requested is legally available and the Applicant's plan to curtail their appropriation during times of water shortage is adequate.

CONCLUSIONS OF LAW

41. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.

Analysis of adverse effect must be determined based on a consideration of an applicant's plan for

the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

42. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(8).

43. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

44. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

45. It is the applicant’s burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

46. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

47. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b) , MCA. (FOF 37-40)

Adequate Diversion

FINDINGS OF FACT

48. The proposed means of diversion will consist of a 16-inch diameter well. The well was constructed by Agri-Industries of Williston, ND, a Montana licensed well driller. The well was completed to a depth of 260 feet, screened from 250 to 260 feet, with a static water level (SWL) of 148 feet. The well will use a Goulds 12CHC 6 vertical turbine pump with a 150HP vertical hollow shaft (VHS) motor.

49. The Pust pumping well was evaluated with a 72-hour constant rate test (the test ended at 69.5 hours) that showed 34.8 feet of drawdown would occur after the 214-day period of diversion. There will be 40.8 feet of available drawdown above the bottom of the well.

50. The well is located roughly just east of the eastern most pivot location. Water will be piped through a buried 12" PVC pipeline to each place of use.

51. The Applicant provided copies of the well log, design specifications and sprinkler chart from Agri-Industries.

CONCLUSIONS OF LAW

52. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

53. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

54. Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No. 41I-105511 by Flying J Inc.* (DNRC Final Order 1999).
55. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 48-51).

Beneficial Use

FINDINGS OF FACT

56. The purpose of this proposed appropriation is irrigation. The Applicant will benefit by having the ability to grow high value crops, not possible without irrigation. The Applicant proposes to irrigate 252 acres with a flow rate of 1,300 GPM and 630 AF per annum. Agri-Industries drilled the well and designed the two center pivot systems. Each Pivot will operate at 1,300 GPM and not operate concurrently. The requested flow rate was determined based on the sprinkler chart and the design specifications of the system. The requested volume of 2.5 AF/acre is within the DNRC standards for sprinkler irrigation within the Climatic II Area. ARM 36.12.115(2)(e).

CONCLUSIONS OF LAW

57. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.
58. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court,

Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

59. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

60. It is the applicant's burden to produce required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

61. Applicant proposes to use water for irrigation which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 630 AF of diverted volume and 1,300 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 56)

Possessory Interest

FINDINGS OF FACT

62. The Applicant signed the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

63. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

64. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

65. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF No. 62)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 42M 30151756 should be GRANTED.

The Department determines the Applicant may divert groundwater, by means of a well (260 feet deep), from April 1st – October 31st at 1,300 GPM up to 630 AF, from a point in the SESESE Section 6, T20N, R58E, Richland County, for irrigation use from April 1st – October 31st. The Applicant may irrigate a variety of crops on 252 acres per annum. The place of use is located in the S2 of Section 6, T20N, R58E, Richland County.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 23rd day of August 2021.

/Original signed by Steven B Hamilton/
Steven B Hamilton, Deputy Regional Manager
Glasgow Water Resource Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 23rd day of August 2021, by first class United States mail.

Stephen Pust
Marilyn R Pust
11153 Highway 16
Savage, MT 59262

Agri-Industries
1775 S Central Ave
Sidney, MT 59270

NAME

DATE